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Electronically filed on August 29, 2017

Attorneys for Timothy L. Blixseth  
Alleged Debtor

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re

TIMOTHY L. BLIXSETH,

Alleged Debtor.

Case No.: BK-S-11-15010-mkn

Chapter 7 (Involuntary)

**SUPPLEMENTAL BRIEF IN SUPPORT  
OF TIMOTHY BLIXSETH'S MOTION  
FOR AN ORDER FOR THE YCLT  
SUCCESSOR TRUSTEE, BRIAN  
GLASSER, TO APPEAR AND SHOW  
CAUSE AS TO WHETHER HE HAS  
PRESERVED ALL EVIDENCE/  
DESTROYED EVIDENCE  
POTENTIALLY RELEVANT TO THE  
LITIGATION OF THIS MATTER (DKT.  
#674)**

Date: September 12, 2017

Time: 2:30 p.m

Judge: Hon. Mike K. Nakagawa

**TO THE HONORABLE MIKE K. NAKAGAWA, UNITED STATES BANKRUPTCY  
JUDGE; OFFICE OF THE U.S. TRUSTEE; PETITIONING CREDITOR, STATE OF  
MONTANA; AND ALL INTERESTED PARTIES:**

Timothy L. Blixseth, alleged Debtor ("Mr. Blixseth" or "Alleged Debtor"), in the above  
entitled matter, by and through his counsel files this supplemental brief in support of his Motion For  
An Order For The YCLT Successor Trustee, Brian Glasser, To Appear And Show Cause As To  
Whether He Has Preserved All Evidence/Destroyed Evidence Potentially Relevant To The

1 Litigation Of This Matter [Docket. #674- “Alleged Debtor’s Motion” or “Motion”] on the following  
 2 grounds:

3 **I. INTRODUCTION.**

4 Alleged Debtor’s Motion is based on a simple question of the Petitioning Creditors:

5 **QUESTION:** Did the YCLT destroy evidence under its care or control?

6 **ANSWER:** The YCLT never denies the destruction of evidence. Period.

7 Throughout the pages of pleadings filed in this case there is no denial that evidence was  
 8 destroyed and certainly no answer to that simple question. In an effort to avoid answering this very  
 9 simple question, the YCLT first asserts that this Court has no jurisdiction to hear the Motion and  
 10 that the entire Motion should be dismissed because this Court is divested “of its control over those  
 11 aspects of the case involved in the appeal” and because this Court no longer “has the power to  
 12 modify its judgment in the case...”. (*See specifically* YCLT’s Opposition, page 9, lines 21-28).  
 13 However, the only relief sought in the Motion as to the YCLT is an OSC for the YCLT to appear  
 14 and show cause as to whether the YCLT Trustee preserved all evidence or destroyed evidence  
 15 potentially relevant to the litigation of this matter and other relief as the court deems necessary. The  
 16 Motion, as to the YCLT, does not seek to proceed with litigating any aspect of the issues on appeal  
 17 or the 303(i) litigation. It is a request for an order to show cause – which simply means the Alleged  
 18 Debtor is asking the court to order the YCLT to answer the question as to whether it destroyed  
 19 evidence and/or preserved evidence. This Court clearly has jurisdiction to do so to maintain the  
 20 “status quo” of the case during the pending appeal.

21 Second, YCLT argues that no evidence has been produced by Alleged Debtor “to justify the  
 22 issuance of an order to show cause.” But, this allegation is not true. One need only read the  
 23 declaration of debtor’s counsel with the attached exhibits of communications to see.

24 Further, the YCLT appears to make the argument that Rule 37 and the other authority  
 25 proffered by Alleged Debtor for this Motion in some way only assists a party *after* evidence has  
 26 been destroyed. One can only assume that the reason that there is a requirement to meet and confer  
 27 in good faith with opposing counsel before filing a discovery motion is to avoid any need for court  
 28 invention. But when those good faith efforts to resolve the discovery issue do not result in resolution

of the concerns addressed, a motion must follow to seek court intervention. Even in the pages the YCLT filed, claiming that no evidence has been provided, the YCLT never says “we preserved all evidence” or “we did not destroy evidence” – it simply refuses to answer the question, as it did when Alleged Debtor met and conferred. Nothing could raise a greater red flag than it’s silence. A civil and professional response would be the admission or denial of that question and would have ended the inquiry. Instead, the question remains unanswered, prompting the need for court intervention.

The YCLT ends its argument regarding a lack of “evidence” attached to the Motion by proffering *U.S. Legal Support, Inc. v. Hofioni* (an unpublished case) to say that the Alleged Debtor’s “mere speculation is an insufficient basis for finding of spoliation.” (See YCLT’s Opposition on page 13, lines 7-8). First, Alleged Debtor is not seeking discovery sanctions against the YCLT (other than for costs of having to bring this Motion and any other relief this court deems necessary). “Mere speculation” would have been filing this Motion without the good faith effort to meet and confer; that is not what transpired.

## II. TO SEEK RELIEF, FRBP 8007 REQUIRES ALLEGED DEBTOR TO FILE THE INSTANT MOTION BEFORE THIS COURT.

FRBP 8007 specifically provides that the Alleged Debtor file this Motion in this Court to seek the relief requested. FRBP 8007(a)(1) states that “Ordinarily, a party must move first in the bankruptcy court for the following relief:...(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or (D) the suspension or continuation of proceedings in a case or other relief permitted by subdivision (e).” FRBP 8007(e) specifically allows for “Continuation of Proceedings in the Bankruptcy Court...” and mandates that “the bankruptcy court may: (1) suspend or order the continuation or other proceedings in the case; or issue any other appropriate orders during the pendency of an appeal to protect the rights of all parties in interest.”

Here, the Alleged Debtor is seeking a “modification” of a stay pending appeal order/”restoration” of the status quo prior to the 2<sup>nd</sup> Stay Order because it appears that order was abused by Montana when it destroyed evidence in violation of the stay order. The “continuation of proceedings” in this case to move forward with 303(i) damages litigation, as well as “other relief”

1 for violation of discovery rules is imperative. Without this Court's intervention, the Alleged Debtor  
 2 will be stripped of the opportunity to properly prove his 303(i) damages and/or fairly litigate the  
 3 entire involuntary bankruptcy filed against him. Alleged Debtor attempted to resolve this issue  
 4 without court intervention. Surly, seeking to determine whether relevant evidence was destroyed,  
 5 after out-of-court-efforts failed, justifies this Motion and court intervention to "**protect the rights**  
 6 **of all parties in interest.**" (See also FRCP 8007 Committee Notes on Rules-2014 which states:  
 7 "Subdivision (e) retains the provision of the former rule that authorizes the bankruptcy court to  
 8 decide whether to suspend or allow the continuation of other proceedings in the bankruptcy case  
 9 while the matter for which a stay has been sought is pending on appeal.").

10 The fact that FRCP 8007 discusses both "modifying" injunctions and/or "**any other**  
 11 **appropriate orders during the pendency of an appeal to protect the rights of all parties in**  
 12 **interest**" gives this Court the jurisdiction and authority to grant the relief requested in the Motion.

### 13 **III. THE CASE LAW ADVANCED BY THE YCLT SUPPORTS THE ALLEGED** 14 **DEBTOR'S REQUESTS FOR RELIEF IN THIS MOTION.**

15 YCLT asserts that "(o)nce a notice of appeal is filed jurisdiction is vested in the Court of  
 16 Appeals, and the trial court thereafter has no power to modify its judgment (emphasis added) in the  
 17 case or proceed further except by leave of the Court of Appeals." (See YCLT's Objection on page  
 18 9, lines 24-28). The relief Alleged Debtor is requesting [*i.e.* an OSC to determine if evidence was  
 19 destroyed and a request for a protective/preservation order to stop further destruction of evidence,  
 20 if any] in no way impacts, interferes with, or effectively circumvents any decision made by the  
 21 District Court as to whether this Court's judgment to dismiss this case for a second time. Rather,  
 22 this relief will serve to protect the rights of ALL parties in interest in this matter. As with any legal  
 23 matter, the preservation of evidence is of the utmost importance to rendering justice in our courts.

24 "A stay pending appeal is designed to keep an appellant's position from eroding while the  
 25 issues on appeal are decided; however, such a stay should not operate to give an appellant a tactical  
 26 advantage it would not have enjoyed had it been successful in the lower court." *In re Strawberry*  
 27 *Square Associates*, 152 B.R. 699, 702 (Bankr. E.D.N.Y. 1993). It is clear that a stay pending appeal  
 28 should not be used by the YCLT or any party as both a sword and a shield to destroy evidence and

1 gain a tactical advantage in either the 303(i) litigation or the potential remand of this case by the  
2 District Court. The erosion of justice must be stopped.

3 The relief requested in this Motion is also unrelated to the issues on appeal by Montana (the  
4 YCLT only participating as an interested party and not having filed any briefing with the District  
5 Court). *See* Montana Department of Revenue's Statement of Issues To Be Presented On Appeal  
6 [Document No 7 in District Court of Nevada case number 2:13-cv-01324-JAD] attached hereto as  
7 **Exhibit 7**. Determining whether the YCLT participated in the destruction of evidence is a simple  
8 inquiry. If the YCLT cannot confirm or deny the destruction of evidence, this motion has served its  
9 purpose to prevent further destruction, in violation of this Court's Second Stay Order, and  
10 remedying the same, which are wholly unrelated to the issues on appeal by Montana before the  
11 District Court. The relief requested may be granted and structured by this Court so as to leave the  
12 pending appeals completely intact and undisturbed.

#### 13 **IV. THERE IS NO ADMISSIBLE EVIDENCE ATTACHED TO THE YCLT'S** 14 **RESPONSE/OBJECTION TO ALLEGED DEBTOR'S MOTION.**

15 The only evidence attached to the YCLT's Objection to Alleged Debtor's Motion to rebut its  
16 contentions is a declaration by YCLT's attorney, Kevin Barrett, admitting copies of documents as  
17 Exhibits to its Objection. Alleged Debtor has refused to take the bait and address the first nine pages  
18 of YCLT's objection and Mr. Barrett's declaration in that neither offers anything of probative value  
19 to the determination of this simple motion. As laid out in Alleged Debtor's evidentiary objections  
20 and Reply, Mr. Barrett's declaration is inadmissible in that it serves only to admit documents that  
21 are wholly irrelevant to the litigation of this Motion. One has to question why all the smoke and  
22 mirrors?

#### 23 **V. CONCLUSION.**

24 Alleged Debtor properly met and conferred with opposing parties. He filed this Motion in  
25 good faith according to the FRBP, and he has presented admissible evidence demonstrating the  
26 concern that very crucial evidence to his defense in this involuntary bankruptcy and his 303(i)  
27 litigation may have been destroyed by the YCLT. Therefore, he respectfully requests this Court  
28 grant his Motion in all respects and grant any other relief the Court deems necessary. Further,

1 Alleged Debtor requests the Court enter an order denying the YCLT's "cross-motion."

2 Respectfully submitted,

3 Dated: August 29, 2017

**DOLING SHAW AND HANOVER, APC**

4 By: 

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Pro Hac Vice Application To Be Submitted

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Pro Hac Vice Application To Be Submitted

COUNSEL FOR PETITIONING CREDITOR MONTANA DEPARTMENT OF REVENUE

UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

In re:	§	Bankruptcy Case No. 11-15010
	§	
TIMOTHY L. BLIXSETH,	§	Involuntary Chapter 7
	§	Montana Department of Revenue's
Alleged Debtor.	§	Statement of Issues To Be Presented
	§	On Appeal

**EXHIBIT "7"**

MONTANA DEPARTMENT OF  
REVENUE,

Appellant,

v.

TIMOTHY L. BLIXSETH,

Appellee.

§ Civil Case No.: 13-1324-JCM

§

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Pursuant to Fed.R.Bankr.P. 8006 and LR 8006, Appellant Montana Department of Revenue ("MDOR") hereby identifies the following issues to be presented on its appeal of the Order Granting Motion To Dismiss Involuntary Case entered on July 10, 2013 (Dkt. #528):

1. Did the Bankruptcy Court err in dismissing the involuntary case against Timothy Blixseth where the involuntary debtor had fewer than 12 qualifying creditors under 11 U.S.C §303(b) and the petition was filed by four qualified creditors?
2. Did the Bankruptcy Court err in concluding that Timothy Blixseth had more than 11 creditors on the Petition Date when the undisputed evidence demonstrated that creditors had either been paid in full prior to petition date or held avoidable transfers under Title 11, Chapter 5, U.S.C.?
3. Did the Bankruptcy Court err in concluding that the California Franchise Tax Board was not a qualifying petitioning creditor under 11 U.S.C. § 303(b)(1), where the liability was based upon sworn, filed, and uncontested state tax returns?
4. Did the Bankruptcy Court err in concluding that the Idaho State Tax Commission was not a qualifying petitioning creditor under 11 U.S.C. § 303(b)(1), where the liability was based upon a final, non-appealed state court judgment and sworn, filed, and uncontested state tax returns?



- 1 5. Did the Bankruptcy Court err in concluding that MDOR was not a qualifying petitioning  
2 creditor under 11 U.S.C. § 303(b)(1), where the liability is based upon repeated judicial  
3 admissions made in a state tax administrative proceeding?  
4  
5 6. Did the Bankruptcy Court err in concluding that post-petition settlements of two  
6 petitioning creditors' claims can convert a claim that was undisputed as of the Petition  
7 Date into a disputed claim for purposes of 11 U.S.C. § 303(b)(1)?  
8  
9 7. Where the allegedly disputed part of a petitioning creditor's claim would not take the  
10 undisputed amount below the monetary threshold for an involuntary bankruptcy, did the  
11 Bankruptcy Court err in disqualifying a petitioning creditor's claim, in light of existing  
12 law and this Court's holding in Focus Media ?  
13

14 Respectfully submitted this 5<sup>th</sup> day of August, 2013.

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Electronically filed on August 29, 2017

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

In re

TIMOTHY L. BLIXSETH,

Alleged Debtor.

Case No. BK-11-15010-mkn

Chapter 7 (Involuntary)

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of DOLING SHAW & HANOVER, APC and that on this 29<sup>th</sup> day of August 2017, I caused the above and foregoing document entitled **SUPPLEMENTAL BRIEF IN SUPPORT OF TIMOTHY BLIXSETH'S MOTION FOR AN ORDER FOR THE YCLT SUCCESSOR TRUSTEE, BRIAN GLASSER, TO APPEAR AND SHOW CAUSE AS TO WHETHER HE HAS PRESERVED ALL EVIDENCE/DESTROYED EVIDENCE POTENTIALLY RELEVANT TO THE LITIGATION OF THIS MATTER (DKT. #674) WITH EXHIBIT "7"** to be served as follows:

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☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Palm Desert, California; and/or

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ to be hand-delivered; and/or

☐ via email.

to the attorney(s)/party(ies) listed below at the address and/or facsimile number indicated below:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



\_\_\_\_\_  
Isabel Tostado  
An employee of DOLING SHAW & HANOVER, APC

## Mailing Information for Case 11-15010-mkn

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### **Creditor List**

Click the link above to produce a complete list of **creditors** only.

### **List of Creditors**

Click on the link above to produce a list of **all** creditors and **all** parties in the case. User may sort in columns or raw data format.